LIBRARY
SUPREME COURT, U. S.

FILED
FEB 2 1968
JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1074

VETERANS OF THE ABRAHAM LINCOLN BRIGADE, MOE FISHMAN, JAMES YATES and MAURY COLLOW,

Petitioners,

v.

ATTORNEY GENERAL OF THE UNITED STATES and THE UNITED STATES CIVIL SERVICE COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID REIN
711 - 14th Street, N. W.
Washington, D. C.

LEONARD B. BOUDIN
30 East 42nd Street
New York, N. Y.

Attorneys for Petitioners

Washington, D. C. · THIEL PRESS · 202 · 393-0625

INDEX

	Page
Opinion below	2
Jurisdiction	2
Questions Presented	2
Executive Orders and Regulations	3
Statement of the Case	3
Reasons for Granting the Writ	5
Conclusion	9

CASES CITED

Association of Lithuanian Workers v. Brownell, 247 F.2d 64, *vacated as moot*, 355 U.S. 23	7, 8
Barsky v. Board of Regents, 347 U.S. 442	5
Cole v. Young, 226 F.2d 337	7
Cole v. Young, 351 U.S. 536	7
Dombrowski v. Pfister, 380 U.S. 479	8
Gilmore v. James, 274 F.Supp. 75, *aff'd sub nom.* James v. Gilmore, __ U.S. __, No. 850 Oct. T. 1967, decided Jan. 15, 1968, 36 U.S. L.W. 3285	6
Industrial Workers of the World v. Clark, United States Court of Appeals for the District of Columbia Circuit No. 20,586 decided Sept. 26, 1967	2, 5, 7, 8
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123	5, 8
National Council v. Brownell, 243 F.2d 222	7, 8
National Lawyers Guild v. Brownell, 225 F.2d 552	7
Schneider v. Roland, 263 F.Supp. 496, *rev'd sub nom.* Schneider v. Smith, __ U.S. __, No. 196, Oct. T. 1967, decided Jan. 16, 1968, 36 U.S. L.W. 4131	6
United Steelworkers of America v. Bagwell, 383 F.2d 492	6

Veterans of the Abraham Lincoln Brigade v. S.A.C.B., 380 U.S. 513 4

Wills v. United States, 384 F.2d 943 7

STATUTES

28 U.S. Code § 1254(1) 2

50 U.S. Code §§ 781, *et seq.* 3

EXECUTIVE ORDERS AND REGULATIONS

Executive Order 9835 . . . . . 2, 3, 4

Executive Order 10450 . . . . . 2, 3, 4

28 C.F.R. § 41.1(a) 4

TEXTS AND ARTICLES

Chafee, The Blessings of Liberty 6

Jackson, The Supreme Court in the American System of Government 6

Note, The Bill of Attainder Clause and Legislative and Administrative Suppression of "Subversives," 67 Col. L. Rev. 1490 6

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No.

VETERANS OF THE ABRAHAM LINCOLN BRIGADE, MOE FISHMAN, JAMES YATES and MAURY COLLOW,

Petitioners,

v.

ATTORNEY GENERAL OF THE UNITED STATES and THE UNITED STATES CIVIL SERVICE COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners pray that a writ of certiorari issue to bring to this Court a case pending in the United States Court of Appeals for the District of Columbia Circuit wherein the petitioners have on appeal a judgment of the United States District Court for the District of Columbia granting summary judgment for the respondents.

OPINION BELOW

No opinion was filed by the District Court. The opinion of the Court of Appeals in a related case, *Industrial Workers of the World v. Clark*, No. 20,586 decided September 26, 1967, is appended hereto as Appendix A. It has not as yet been reported.

JURISDICTION

The judgment of the United States District Court for the District of Columbia was entered on November 14, 1967. A notice of appeal was filed by petitioners on November 24, 1967, and the case was docketed in the United States Court of Appeals for the District of Columbia Circuit on January 3, 1968. The jurisdiction of this Court is invoked under 28 U. S. Code, sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the provisions of Executive Orders 9835 and 10450 authorizing the Attorney General to designate organizations as totalitarian, fascist, communist, subversive, etc. are unconstitutional on their face.

2. Whether the Attorney General's designations of organizations pursuant to said Executive Orders violate the First, Fifth, Ninth and Tenth Amendments of the Constitution and constitute bills of attainder.

3. Whether an organization which the Attorney General has designated as "subversive" or its members may challenge the constitutional power of the Attorney General to list organizations without first exhausting the administrative procedures set up by the Attorney General.

4. Whether the procedural regulations of the Attorney General for designating organizations are unconstitutional on their face or as applied to petitioner.

EXECUTIVE ORDERS AND REGULATIONS INVOLVED

The pertinent provisions of Executive Orders 9835 and 10450 and of the Attorney General's Rules of Procedure are set forth in Appendix B, *infra*.

STATEMENT OF THE CASE

On or about March 21, 1947, the Attorney General of the United States issued, pursuant to Executive Order 9835, a list of organizations separately characterized as "totalitarian, fascist, Communist or subversive." Among the organizations listed as "Communist" were the petitioner, the Veterans of the Abraham Lincoln Brigade (hereafter called the Veterans), and the Abraham Lincoln Brigade (hereafter called the Brigade). The designations were made without notice or hearing, and no provision existed for seeking administrative relief.

The Veterans is an unincorporated association whose membership consists of those members of the Brigade who returned to the United States from Spain after fighting from 1936 to 1938 in the armed forces of the Republic of Spain in support of the constitutionally elected government against insurgent, fascist forces. The individual petitioners all served in the Spanish Civil War as members of the Brigade and are members of the Veterans. The purpose and activities of the Veterans were to foster and continue the friendships formed in Spain during this period, to provide rehabilitation and medical care for members of the Brigade, to assist members of the Brigade in obtaining employment, food and living facilities upon their return to the United States, and to publish a periodical devoted to the activities of members of the Brigade.

On April 22, 1953, the Attorney General petitioned the Subversive Activities Control Board for an order requiring the Veterans to register as a "Communist-front organization" under section 7 of the Subversive Activities Control Act, 50 U. S. Code, §§ 781 *et seq.*

A few days later, on or about April 27, 1953, the Attorney General reissued his list of disapproved organizations, but without separate characterizations, under Executive Order 10450, which superseded Executive Order 9835. The Brigade and the Veterans were continued on the list.

The relisting was also unaccompanied by notice or hearing. However, at the time of the redesignation, the Attorney General issued regulations providing procedures for contesting the listing. Under these regulations, an organization whose listing was carried over from the previous designation was allowed ten days from the effective date of Executive Order 10450 to file with the Attorney General a written notice that it contested the listing. See 28 C.F.R. § 41.1(a). Failure to file such a notice of contest was declared by the regulations to be "an acquiescence in such designation."

The Brigade was not then in existence, having expired in 1938. The Veterans did not file a "notice of contest" within the ten day period, but contested the proceedings instituted against it by the Attorney General before the Subversive Activities Control Board.

The Board issued a registration order, but after court review and a remand of the case (see *Veterans of the Abraham Lincoln Brigade v. S.A.C.B.*, 380 U.S. 513), the registration order was vacated and the Attorney General's petition dismissed by the Board on April 20, 1966, on joint motion of the Veterans and the Attorney General.

On May 31, 1966, counsel for the Veterans requested the Attorney General to remove the names of the Veterans ~~and the Brigade~~ from the list of "subversive organizations." On July 6, 1966, the Attorney General denied this request.

Petitioners thereupon filed in the United States District Court for the District of Columbia a complaint for a declaratory judgment and an injunction, seeking removal of the Veterans ~~and the Brigade~~ from the Attorney General's list. The theory of the complaint was that the listing violated the First, Fifth, Ninth and Tenth Amendments and the prohibition of bills of attainder. The complaint alleged that the

listing was injuring the reputation, business and prestige of the Veterans and its ability to obtain and retain members and to fulfill its purposes. It was also alleged that the list was used by the respondent Civil Service Commission, the Department of Defense, the Coast Guard, other federal agencies, State and local governments, and private concerns and individuals, as a basis for denying members of the Veterans and the Brigade various rights and benefits, such as employment, trade union membership, ability to rent halls and meeting places, etc.

The parties filed cross-motions for summary judgment, and the court granted the respondents' motion for summary judgment and denied petitioners'. In so doing the court relied upon the decision of the United States Court of Appeals for the District of Columbia Circuit, *Industrial Workers of the World v. Ramsey Clark*, No. 20568, decided September 26, 1967.[2] The Court of Appeals held in that case that an organization on the Attorney General's list could not attack the constitutionality of the listing because it had failed to file a notice of contest under the Attorney General's rules and because it was barred by laches.

REASONS FOR GRANTING THE WRIT

1. The importance and substantial nature of the constitutional questions posed by the present case need no elaboration, since they were recognized by the various opinions in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123. That decision did not reach, but cast a serious cloud on, the power of the Attorney General to list organizations as "subversive." The opinions of Justices Black and Douglas concluded that the Attorney General's list violated the First Amendment and was a bill of attainder (at 143, 177). This view was reiterated by Justices Black and Douglas in *Barsky v. Board of Regents*, 347 U.S. 442, 459.

---

[2] A petition for a writ of certiorari in this case has been filed and is pending in this Court, No. 953, 1967 Term.

In his posthumously published book, *The Supreme Court in the American System of Government*, Mr. Justice Jackson stated (at p. 25): "In 1951 the Court cast serious doubts upon the legality of the Attorney General's list of subversive organizations promulgated in 1947. But the list had long been widely circulated and accepted, and despite the Court's views it has never ceased to be used in the press, in the executive department, by and before congressional committees, and even in courts to prejudice individuals in their liberty, position and good name."

Prof. Chafee has stated (*The Blessings of Liberty*, p. 27): "The list . . . has been widely employed by states and cities and even by private organizations as proof of the disloyalty of teachers and employees. The radio industry has accepted it as a basis for canceling the contracts of its performers. The list has accordingly become a powerful weapon for injuring any group there named or any individual who belongs to such a group."

These observations are confirmed by events discussed in such recent cases as *Gilmore v. James*, 274 F. Supp. 75, aff'd sub nom. *James v. Gilmore*, __ U.S. __, No. 850, Oct. T. 1967, decided Jan. 15, 1968, 36 U.S.L.W. 3285 (applicants for University employment required to sign statements of non-membership in organizations on Attorney General's list); *United Steelworkers of America v. Bagwell*, 383 F.2d 492 (permit to distribute leaflets barred to members in listed organizations); *Schneider v. Roland*, 263 F. Supp. 496, rev'd sub nom. *Schneider v. Smith*, __ U.S. __, No. 196, Oct. T. 1967, decided Jan. 16, 1968, 36 U.S.L.W. 4131 (list used in Coast Guard screening of applicant for merchant marine employment). And see Note, *The Bill of Attainder Clause and Legislative and Administrative Suppression of "Subversives,"* 67 Col. L. Rev. 1490, 1506-1508.

Thus notwithstanding its constitutional dubiety, the Attorney General's list continues to be used on a wide scale to defame organizations and to discourage exercise of the right of association.

2. Efforts to challenge the validity of the Attorney General's list have been frustrated by perplexing procedural obstacles erected by the United States Court of Appeals for the District of Columbia Circuit and applied to petitioners in this case by the District Court, and by evasive actions of the Attorney General.

The Court of Appeals has barred listed organizations from challenging constitutional power of the Attorney General on the grounds of failure to exhaust administrative remedies. See *National Council v. Brownell*, 243 F.2d 222; *Association of Lithuanian Workers v. Brownell*, 247 F.2d 64, vacated as moot, 355 U.S. 23; *National Lawyers Guild v. Brownell*, 225 F.2d 552; *Industrial Workers of the World v. Clark, supra*. In the last cited case, the Court also applied a remarkable doctrine of laches, finding that the Attorney General would be prejudiced (concededly a necessary element in applying laches) if the I.W.W. obtained a decision that the list was unconstitutional, because other listed organizations might then also sue to have the list declared unconstitutional.

As to the court's exhaustion doctrine, that might be applicable to bar a litigant from litigating in court evidentiary objections not raised in an available administrative proceeding. It passes understanding how failure to exhaust an administrative evidentiary procedure can bar a challenge to constitutional power. See *Cole v. Young*, 351 U.S. 536, held that exhaustion of an administrative remedy was not a prerequisite to a judicial challenge to the government agency's power.[3] The Court of Appeals for the District of Columbia Circuit had adopted the same position in *Cole*, stating, 226 F.2d 337 at 339: "It [the government] says Cole failed to exhaust his administrative remedy and so his action must fall. While Cole failed to pursue the administrative remedy offered him – he affirmatively rejected it – nevertheless the administrative process was exhausted and a final administrative de-

[3]For another application of this rule see *Wills* v. *United States*, 384 F.2d 943.

cision was reached and rendered. This is the nub of the rule that the administrative remedy must be exhausted. We think the Government's point is not well taken."[4]

Moreover, the Court of Appeals recognized in the *I.W.W.* case, *supra*, that since the *Joint Anti-Fascist* case, *supra*, there has been considerable development in the law as to the permissibility of government screening of employees and the visiting of other consequences on individuals because of their political associations and views. See ftn. 9 of that opinion, Appendix A p. 11 herein. Nevertheless, the court refused to consider the validity of the list in light of the new learning.

The Attorney General has warded off challenges to his constitutional power by several acts of discretion. He abandoned his proposal to list the National Lawyers Guild, when its determination to litigate the matter to a conclusion became obvious. See the account in *Dombrowski v. Pfister*, 380 U.S. 479, 495, ftn. 12. He suddenly delisted *ex parte* two organizations, without any prior indication or administrative proceeding, after they filed a petition for certiorari in this Court challenging their listing, thus mooting the case. See *Association of Lithuanian Workers v. Brownell*, 355 U.S. 23. Since that time he has added no more organizations to the list, although it is apparent that there are now extant many new groups which are "subversive" by the standards reflected in the list. It is not an unfair inference that his forbearance has been at least in part due to his recognition that his authority to list is constitutionally dubious.

As matters now stand, unless the Court reviews the validity of the list in a case brought by an organization, such as petitioner here, which has been listed since 1947, the list will remain immune from judicial review, although it will

---

[4]The Court of Appeals did not elucidate, either in the *National Council* case or the *I.W.W.* case why the *Cole* principle was not applicable to a challenge to the validity of the Attorney General's list.

continue to serve as an oppressive weight on the freedom of association.

3. The Court of Appeals has in its prior decisions already ruled adversely to petitioners on the questions they raise. Petitioners should not be required to seek the preordained decision of that court. The petition of the I.WW. is now pending in this Court. This case will bring before the Court a different approach to the constitutional questions and additional facts which will be enlightening in decision of those questions.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

David Rein
711 - 14th Street, N. W.
Washington, D. C.

Leonard B. Boudin
30 East 42nd Street
New York, N. Y.

Attorneys for Petitioners

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,586

INDUSTRIAL WORKERS OF THE WORLD, ETC., ET AL.,
APPELLANTS

v.

RAMSEY CLARK,
ATTORNEY GENERAL OF THE UNITED STATES,
APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided September 26, 1967

Mr. Marshall Patner for appellants. *Mr. William Brackett* also entered an appearance for appellants.

Mr. Kevin T. Maroney, Attorney, Department of Justice, with whom *Assistant Attorney General Yeagley, Mr. George B. Searls* and *Mrs. Lee B. Anderson,* Attorneys, Department of Justice, were on the brief, for appellee.

Before DANAHER, LEVENTHAL and ROBINSON, *Circuit Judges.*

LEVENTHAL, *Circuit Judge:* This case presents problems arising out of the establishment and maintenance of the so-called "Attorney General's List." Relying on various federal statutes, President Truman in 1947 issued Executive

Order No. 9835, 12 Fed. Reg. 1935, establishing an Employees Loyalty Program in the Executive Branch of the Government. By this order the Attorney General was directed to furnish the Loyalty Review Board with the names of each foreign or domestic organization or association which he, after "appropriate investigation" designated as fascist, communist, totalitarian, or otherwise subversive. Thereupon the Board was instructed to disseminate this information to all federal departments and agencies. In 1949 the Attorney General cited the Industrial Workers of the World (IWW), appellant herein, as such an organization seeking to alter the form of government of the United States by unconstitutional means. *See* 14 Fed. Reg. 2371 (1949).

On April 27, 1953 President Eisenhower revoked Executive Order No. 9835, replacing it with Executive Order No. 10450, [18 Fed. Reg. 2489]. This new order somewhat refined notions of loyalty to make "security" the ultimate aim of the program. The new order continued the directive that the Attorney General compile and maintain a list of subversive organizations, but provided that he was to communicate this information directly to heads of departments and agencies. Pursuant to this directive, the Attorney General on April 29, 1953, 18 Fed. Reg. 2741, redesignated the organizations previously listed under the prior Executive Order, including the IWW. The Attorney General accompanied the redesignation with regulations setting forth procedures for prompt challenge to a proposed listing. Under the new regulation any organization whose listing was carried over from the previous determination was given ten days from the effective date of Executive Order No. 10450 (May 27, 1953) to file a written notice that it contested such listing. *See* 28 C.F.R. § 41.1(a) (1967). Failure to file such a notice of contest was declared to be "an acquiescence in such designation."[1]

[1]Membership in a listed organization is a factor used in weighing qualifications for federal employment, federally financed housing, and other federally created benefits. (JA 27) There is also a suggestion that because of the wide circulation of the list, it has had some impact on state and private employment and benefits. (JA 4)

The IWW made no such objection within that ten day period. Although the IWW kept up correspondence with the Attorney General intermittently over the years protesting its inclusion in the Attorney General's List, no court challenge to the organization's listing was made until the present action was instituted in 1965. The Attorney General then raised the defense of laches, contending that the exchange of letters over twelve years did not keep alive any objection to the 1953 listing. The District Court dismissed the action on the ground that the administrative remedies available with respect to the 1953 listing had not been exhausted.

We do not consider the merits of the IWW's claims that the procedures for listing allegedly subversive groups fatally offend the First and Fifth Amendments. Compare *Joint Anti-Fascist Refugees Comm. v. McGrath,* 341 U.S. 123 (1951), with *National Lawyers Guild v. Brownell,* 96 U.S. App.D.C. 252, 225 F.2d 552 (1955), *cert. denied* 351 U.S. 927 (1956), and *Association of Lithuanian Workers v. Brownell,* 101 U.S.App.D.C. 73, 247 F.2d 64, *vacated as moot,* 355 U.S. 23 (1957). We conclude that the failure to object within the allotted period to the 1953 listing precludes any judicial determination at this time that that listing was unlawful.

A 10-day period would be too "cabined and confined" to suffice as the exclusive opportunity for asserting a constitutional right available to a body of citizens whose circumstances do not encourage initiative and enterprise. *Lane v. Wilson,* 307 U.S. 268, 276 (1939). But it was reasonable for the Attorney General to assume that different considerations were properly applicable to persons already "organized" for expression of political views, if not more comprehensive purposes, and presumptively acquainted with rights and remedies.[2] In this context we note that since the IWW was a re-listed organization, it in fact had a period of 38

---

[2] *Cf.* Yakus v. United States, 321 U.S. 414 (1944).

days to file its objection,[3] and further note that although the IWW has objected to the procedures on the ground that they do not require actual notice of listing, there is no contention that the IWW was not in fact aware of the Attorney General's determination to continue listing it as a subversive organization in time to raise a contest.

That, however, is not the end of this case. Although the regulations issued on the heels of Executive Order 10450 provide in considerable detail for the mechanics of notice and hearing when a listed organization raises a timely challenge to the listing, within ten days of its effective date, *see* 28 C.F.R. §§ 41.1-.11 (1967), there is not a public suggestion. How, if ever, a listed organization may subsequently exonerate itself, if perchance it did not object within the ten day period. The stipulation of undisputed facts entered into between the parties recites:

> 8. Because neither the Executive Order nor the Rules issued thereunder provide a procedure for an organization's removal from the list of those designated, the defendant [Attorney General] has informally added to the above Rules the concept of administrative review upon a showing of a material change in the character of the organization or newly discovered material evidence. (JA 23)

The Attorney General assures us that "although the regulations do not provide a procedure for removing an organization from the list, defendant would, of course, afford further administrative proceedings to a designated organization upon a showing of a material change in the character of the organization or any substantial new and material evidence." (Brief for Appellee at 2.) The Attorney General correctly

---

[3] Executive Order No. 10450 was promulgated on April 27, 1953, to become effective thirty days later on May 27, 1953. On the 29th of April, the Attorney General published in the Federal Register, 18 Fed. Reg. 2619, the rules of procedure for the federal employee security program. These rules announced that previously listed organizations could file contests to relisting within ten days after the (May 27) effective date of the Executive Order.

characterizes this technique of administrative review and reconsideration as "informal," since its origin and establishment appear only in correspondence with listed organizations. The decision as to what constitutes a "material change in the character of the organization" or "substantial and new material evidence" is apparently made ex parte by the Attorney General, and he has articulated no standards to guide his judgment on such questions.

We note that because of its failure to raise an objection to the 1953 listing within the period specified in the 1953 regulation, the IWW has never been advised what the substantive basis was for the determination to list it as a subversive organization. In such a context, a bare requirement that a listed organization demonstrate to the Attorney General's satisfaction that there is "new" material evidence or a material "change in the character" of the organization emerges as something less than a wholly satisfactory administrative remedy.

We need not pass at this point on whether the informal review the Attorney General assures us he makes available in this context is adequate.[4] The IWW does not raise that precise challenge. This is an area where First Amendment guarantees of freedom of speech, press, and political association are involved, however, and we consider this issue open in the further proceedings which we are ordering.

In any event, in this case we find that the IWW has resorted to what has thus far appeared as an administrative remedy, and despite the silence of the District Court on this aspect of the case, the IWW has, we think, timely raised a justiciable objection that the Attorney General's denial of relief was arbitrary.

We have referred to an irregular course of correspondence between the IWW and the Attorney General, dating at least from January 1954, in which the IWW continued to object

---

[4] *Compare* Silver v. McNamara, 111 U.S.App.D.C. 334, 296 F.2d 591 (1961).

to its listing and the Attorney General consistently relied on the IWW's default in failing to protest within ten days of the listing in 1953. Of particular significance is the exchange of letters that began on December 23, 1964, when counsel for the IWW wrote to the Attorney General seeking information about the steps necessary to secure removal of the organization from the subversive list. On January 6, 1965, the Assistant Attorney General, Internal Security Division, responded that it seemed "extremely improbable that an organization could be properly delisted upon a review by the Acting Attorney General if his review were limited to a mere reconsideration of the information considered by Attorneys General [Tom C.] Clark, McGrath and Brownell at the time of their respective decisions to designate the organization." The letter proceeded to advise the IWW once more though that "a petition of the organization requesting delisting will be given careful study and consideration if it presents new information providing a reasonable basis for considering such delisting." (JA 29-30)[5]

Then on February 13, 1965, the IWW submitted a letter styled "Petition" formally requesting delisting, or in the alternative seeking at least a hearing in support of the petition. The principal thrust of the petition, evidently designed to meet the Attorney General's precondition of "new material evidence" respecting the character of the organization was reliance on the May 21, 1964 decision of the Seventh Circuit in the case of *Thompson v. Immigration and Naturalization Service*, 332 F.2d 167, reversing *In re Thompson's Petition*, 209 F.Supp. 494 (N.D. Ill. 1962). There the District Court had rejected a naturalization petition on the ground that the petitioner was a member of the IWW, and that the IWW was an organization advocating the alteration of the American government by unconstitutional means.

---

[5]This presumably was in the same vein as the Attorney General's informal assurance that "you may . . . submit for review any information you deem pertinent concerning the policies and objectives of your organization at this time." (Letter dated July 7, 1956, JA 23.)

The District Court sought to support its view with copious references to the literature of the IWW. The Seventh Circuit reversed this finding with the terse notation that it was "clearly erroneous" (332 F.2d at 170), relying on its rejection of a similar finding as to the Socialist Workers Party in *Scythes v. Webb*, 307 F.2d 905 (7th Cir. 1962).[6] Since the court also rejected a separate point argued in the alternative by the Government, it reversed the order denying naturalization.

As support for its request in the alternative for a hearing on the merits of the original listing, the IWW claimed that the January 6, 1965 letter from the Assistant Attorney General inviting submission of new evidence on the validity of the listing constituted a waiver of the ten day limitation period.

Shortly after this Petition was filed, the Attorney General denied all relief. His letter referred to the earlier assurances that new information providing a reasonable basis for delisting would be given careful consideration, but concluded: "[T]he information contained in the petition . . . which

[6]In the *Scythes* case the Seventh Circuit held that ambiguous and abstract passages in party literature do not suffice to characterize an organization as one advocating the violent overthrow of the government. The court relied on Scales v. United States, 367 U.S. 203 (1961), and Noto v. United States, 367 U.S. 290 (1961), stating that although the government's burden of proof was less in a deportation case (like that of *Scythes*) than in a prosecution under the Smith Act, there was no material difference in regard to the test for determining whether an organization advocates or teaches the violent overthrow of the government.

In *Thompson* the court did not rest its decision on the ground of the hearing or peculiar burden resting on the government in naturalization cases but rather, as appears from its reference to *Scythes*, on the ground of error in the ultimate standard used in the Department of Justice, i.e. by the naturalization examiners, and adopted by the District Court, for determining whether an organization advocated the violent overthrow of the government. One judge would have affirmed the denial of naturalization on another ground; he did not dissent from the court's ruling as to the nature of the IWW.

you forwarded . . . does not warrant review by this Department. In addition the case of *Thompson v. Immigration & Naturalization Service,* 332 F.2d 167 (1964), is not in point since it relates to a petition for naturalization by an individual. In this connection it should be pointed out that the Socialist Workers' Party remains an organization designated pursuant to Executive Order 10450, even though in a deportation proceeding *Scythes v. Webb,* 307 F.2d 905 (1962), the United States Court of Appeals for the Seventh Circuit found, under the standard before laid down, that there was no substantial evidence in the record that the Socialist Workers' Party advocates or teaches the violent and forceful overthrow of the Government of the United States."

On May 4, 1965, the IWW finally resorted to the courts. In addition to urging that the court declare the original listing void on the ground that it violated restrictions on the delegation of powers and offended constitutional guarantees of notice and hearing, it insisted that the Attorney General had waived the ten-day requirement, and—importantly—averred that the Attorney General's rejection of the February 12 petition was "arbitrary and capricious." The IWW added that it had exhausted its administrative remedies, and requested the court to order the Attorney General to grant a hearing, grant an injunction against further listing, and provide "such other and further relief as is just."

In his answer, in addition to raising the defenses of laches and failure to exhaust administrative remedies, the Attorney General denied the charge of arbitrary and capricious rejection of the petition (JA 17). In its motion for judgment on the pleadings, the IWW repeated its contention that the Attorney General's "action was arbitrary and capricious" in that he "summarily refused the petition and evidence." In his counter motion for summary judgment or dismissal, the Attorney General alleged that the decision in *Thompson* "is entirely irrelevant and immaterial to the designation of the plaintiff organization under Executive Order No. 10450." (JA 20) Once more, in opposing the Attor-

ney General's motion, the IWW averred that "specific arbitrary and capricious actions of the defendant include: Specific refusal to consider the decision . . . in *Thompson v. I.N.S.*, . . . the only proper relevant determination ever made of the character" of the IWW.

The District Court recognized that some broad constitutional issues were involved, but held there was no occasion to reach them. As the sole explanation for the denial of the IWW's prayers for relief and the grant of the Attorney General's motion for summary judgment, the court ruled that "by failing to exhaust its administrative remedy [of contesting the listing within ten days] the plaintiff has precluded itself from pursuing a judicial remedy."

We approve of the denial of relief premised on alleged infirmities in the 1953 listing of the IWW as a subversive group. In addition to the failure to exhaust administrative remedies,[7] the Attorney General raised the equitable defense of laches, which includes the two-fold elements of reasonable delay and likelihood of prejudice to the defendant. Here it was set forth in the statement of facts as to which there is no material dispute that the IWW had "no legal excuse for their delay of twelve years in seeking a judicial determination of their allegations relative to their designation under Executive Order No. 10450" and that it "is reasonable to presume that entertaining this suit would give rise to numerous similar suits by others of the nearly three hundred organizations designated under Executive Order No. 10450." It is also reasonable to assume that this delay would severely complicate the ability to adduce evidence available when the original determination was made.

The District Court accompanied its judgment with a brief, oral statement that appellant's failure to exhaust its admin-

---

[7] *See* JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 450-58 (abr. ed. 1965).

istrative remedies precluded pursuit of a judicial remedy. We have approved the refusal to provide judicial relief when a listed organization deliberately by-passed administrative channels. See *National Council of American-Soviet Friendship v. Brownell,* 100 U.S.App.D.C. 116, 243 F.2d 222 (1957). We cannot say it was an abuse of discretion for the District Court to refuse to consider the IWW's challenges to its 1953 listing.

That determination, however, does not dispose of the case, and herein lies the District Court's error. To say that the IWW can no longer demand a judicial hearing on the validity of the 1953 listing is a far cry from concluding that the organization is eternally ousted from resort to the courts for other, subsequent complaints. It is settled that justiciable rights are involved here. See *Joint Anti-Fascist Refugee Comm. v. McGrath, supra.* First Amendment rights are at stake. In such a situation we think the chief law officer of the United States is under a legal duty to adhere to minimal standards of fairness and reasonableness when he acts.

Even where an organization failed to exhaust the administrative remedy provided by the regulation, this court concluded that an additional period should be provided to an organization that had made clear its non-acquiescence in the listing. *Joint Anti-Fascist Refugee Committee v. Brownell,* 94 U.S.App.D.C. 341, 215 F.2d 870 (1954).

Here we have another issue—the action on appellant's petition for delisting in the light of developments subsequent to 1953, namely the Seventh Circuit's 1964 ruling in *Thompson.* That decision is not necessarily dispositive of the complaint before us. The Attorney General asserts that it is "entirely irrelevant and immaterial" to the designation of the IWW, but this is the determination that the organization claims is arbitrary and wishes a court to examine. It argues in the alternative that the *Thompson* decision provides at least sufficient momentum to entitle it to an administrative hearing on its prayer for discontinuance of the listing.

The District Court withheld consideration on the merits of the claim that the refusal was arbitrary, but we believe the IWW was entitled to judicial consideration of that issue. This entails at least a careful analysis of the *Thompson* litigation. Ultimate resolution may come to require some consideration of the factual background for appellant's designation, for this may be decisive in determining whether it was indeed capricious to term the *Thompson* ruling "entirely irrelevant." The problem is not a simple one. It is clear enough that reasonable consideration must be given to new evidence. Apparently the Attorney General would also agree that reasonable consideration must be given to newly announced legal doctrine. Such consideration is available in a court notwithstanding an earlier decision in the same controversy put forward as the law of the case.[8] The *Thompson* decision is a third category—the appearance of a new judicial determination of the ultimate legal significance of relevant evidence, a determination that may embody both factual inferences and changing legal concepts.

We do not now intimate any view on the merits of this allegation other than to hold that it adequately raises an issue that the District Court ignored. Since 1953, when the last deliberate decision to list the IWW as a subversive group was made, there has been a considerable development in public and judicial attitudes toward control of subversives.[9]

While none of the decided cases precisely involves the issues the District Court is to consider on the remand, their approach may have some relevance in determining whether

---

[8]Naples v. United States, 123 U.S.App.D.C. 292, 359 F.2d 276 (1966).

[9]*See e.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966); United States v. Brown, 381 U.S. 437 (1965); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Scales v. United States, 367 U.S. 203 (1961); Noto v. United States, 367 U.S. 290 (1961); Communist Party v. SACB, 367 U.S. 1 (1961); Kent v. Dulles, 357 U.S. 116 (1958); Yates v. United States, 354 U.S. 298 (1957).

the Attorney General's conduct must be held arbitrary and capricious. We think the District Court, having judicial jurisdiction,[10] should have the first opportunity to address itself to this question, with such further amplification by the parties as the court in its sound discretion deems advisable.

The order granting summary judgment in favor of the Attorney General is affirmed insofar as it declines to review the 1953 listing. In regard to appellant's claim that the Attorney General acted arbitrarily on its 1965 petition for delisting, the order is vacated and the cause is remanded for further proceedings not inconsistent with this opinion.

So ordered.

---

[10]The Attorney General challenges, *inter alia*, judicial jurisdiction, on the principle that this is in effect an unconsented-to suit against the United States. That issue was settled in the IWW's favor by *Joint Anti-Fascist*. The Attorney General argues that the IWW has pointed to no statutory provision consenting to suit against the Attorney General in his official capacity. Although we agree that general grants of judicial jurisdiction are not usually construed as consent to suit, the IWW in its complaint squarely relied on Section 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-06 (Supp. II, 1965-66), which accords a right to judicial review to "a person suffering legal wrong because of agency action" (§ 702). "Agency" is defined as "each authority of the Government of the United States," except for irrelevant exceptions (§ 701(b)(1)). In the absence of any specified form of proceeding, review may be had by "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction" (§ 703). And Section 706 broadly directs the courts, to the extent necessary, to decide questions of law, interpret constitutional and statutory provisions, "compel agency action unlawfully withheld or unreasonably delayed," and hold unlawful and set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." If consent to suit there must be consent to suit there here is.

DANAHER, *Circuit Judge, dissenting:* To the extent that my colleagues find no error in the order under review I would agree, but there I would stop. I think this case should not be remanded for any purpose.

Listed pursuant to the 1947 Executive Order No. 9835, and further listed after the 1953 Executive Order No. 10450, these appellants at neither time took the steps available to them to contest their designation. No timely challenge was levied against the orders or the regulations issued pursuant thereto. No administrative relief was sought. No judicial relief was asked. My colleagues acknowledge, as they must, that the District Court did not abuse its discretion in rejecting the appellants' present attack upon designation following Executive Order 10450, *National Council of American-Soviet F. v. Brownell,* 100 U.S. App. D.C. 116, 243 F.2d 222 (1957).

But, some twelve years having elapsed since the designation, my colleagues say they can now discern that a justiciable controversy has emerged. Although no allegations had been submitted to the Attorney General to suggest a "material change in the character of the organization," and there had been no showing of "newly discovered material evidence" or why it is only now "newly discovered," my colleagues would cause this case to be reopened. Neither in their correspondence nor in the record had the appellants proffered compliance with the basis upon which the Attorney General said he would be moved to act.

Let them, even now, not on their own terms but on his, meet the conditions upon which the Attorney General said *he* would entertain reconsideration. This is no case for this court's intervention on the record now before us.

I dissent.[1]

[1] And insofar as the majority seems to find that Thompson v. Immigration & Naturalization Service, 322 F.2d 167 (7th Cir. 1964) has somehow infused new life into the defunct claim here resurrected, I suggest a mere reading of the opinion will demonstrate that a completely distinguishable issue was there presented. I agree with the Attorney General's conclusion that what was there decided in 1964 was "entirely irrelevant" to the designation of the appellant organization in 1953.

APPENDIX B

EXECUTIVE ORDERS AND REGULATIONS INVOLVED

I. Section 3, Executive Order 9835, 12 F. R. 1935

3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

II. Pertinent Provisions of Executive Order 10450, 18 F. R. 2489

Sec. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

* * *

Sec. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

* * *

(5) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

* * *

Sec. 12. Executive Order No. 9835 of March 21, 1947, as amended is hereby revoked. For the purposes described in section 11 hereof the Loyalty Review Board and the regional loyalty boards of the Civil Service Commission shall continue exist and function for a period of one hundred and twenty days from the effective date of this order, and the Department of Justice shall continue to furnish the information described in paragraph 3 of Part III of the said Executive Order No. 9835, but directly to the head of each department and agency.

III. Attorney General's Rules of Procedure for the Federal Employee Security Program—Department of Justice Regulations of April 29, 1953, 18 F. R. 2619, 28 C. F. R. Part 41

Section 41.1 *Notice to and by Organizations.* (a) Within ten days after the effective date of Executive Order No. 10450 of April 27, 1953, each organization which has been designated by the Attorney General pursuant to Paragraph 3 of Part III of Executive Order No. 9835 of March 21, 1947, may file with the Attorney General, Department of Justice, Washington, D. C., a written notice that it contests such designation. Failure to file a notice of contest within such period shall be deemed an acquiescence in such designation.

(b) Whenever the Attorney General after appropriate investigation proposes to designate an organization pursuant to

Executive Order No. 9835 or Executive Order No. 10450, or both, notice of such proposed designation shall be sent by registered mail to such organization at its last known address. If the registered notice is delivered, the organization, within ten days following its receipt or ten days following the effective date of Executive Order No. 10450, whichever shall be later, may file with the Attorney General, Department of Justice, Washington, D. C., a written notice that it desires to contest such designation. If the notice of proposed designation is not delivered and is returned by the Post Office Department, the Attorney General shall cause such notice to be published in the Federal Register, supplemented by such additional notice as the Attorney General may deem appropriate. Within thirty days following such publication in the Federal Register, such organization may file with the Attorney General, Department of Justice, Washington, D. C., a written notice that it desires to contest such designation. Failure to file a notice of contest within such period shall be deemed an acquiescence in such proposed action, and the Attorney General may thereupon after appropriate determination designate such organization and publish such designation in the Federal Register.

(c) The notice of contest provided in this Part shall be signed by the executive officers (or persons performing the ordinary and usual duties of executive officers) of the organization which desires to contest such designation or proposed designation.

Section 41.2 *Statement and Interrogatories by Attorney General.* Within sixty days following receipt of a notice of contest, the Attorney General shall cause to be forwarded to the organization by registered mail a statement of the grounds upon which the designation was or is proposed to be made and written interrogatories with respect thereto. In the case of organizations designated pursuant to Paragraph 3, Part III of Executive Order No. 9835, such statement may include information obtained since the designation.

Section 41.3 *Reply by Organization.* The organization, within sixty days following receipt of such statement and interrogatories may file a verified reply which shall be signed by the executive officers (or persons performing the ordinary and usual duties of executive officers) of such organization. The reply shall answer each interrogatory completely and with particularity and shall be limited to statements of fact. The organization may also submit supporting affidavits with its reply. Failure to answer any interrogatory or any part thereof shall be deemed an admission of the truth of the facts to which such interrogatory or part thereof refers. The submission of an evasive reply to any interrogatory or any part thereof shall likewise be deemed an admission of the facts to which such interrogatory or part thereof refers. Failure of the organization to file a reply within the sixty days provided therefor shall constitute an acquiescence in designation.

Section 41.4 *Request for Hearing.* Any organization filing a reply as provided in this Part may accompany its reply with a written request for a hearing. In the absence of such request, the Attorney General shall determine the matter on the basis of the information available to him and the reply of such organization.

Section 41.5 *Notice of Hearing.* Upon receipt of a request as provided in Section 41.4, the Attorney General will set a date and fix a place for hearing and notify the organization thereof by registered mail.

Section 41.6 *Default.* When an organization declines or fails to appear at any scheduled hearing, the Attorney General shall without further proceedings determine the matter on the basis of the information available to him and the reply of the organization.

Section 41.7 *Hearing Board or Officer.* For the purpose of conducting any hearing as provided in this Part the Attorney General shall assign such officer or board as he shall deem necessary.

Section 41.8 *Hearing.* (a) If upon the basis of the statement, interrogatories, reply and affidavits (if any) submitted as provided in this Part it appears to the board or hearing officer that a determination may appropriately be made without the taking of evidence, the proceeding may be conducted without the taking of such evidence.

(b) The Attorney General, at his election, may rely upon the statement of grounds upon which the designation was or is proposed to be made, or may introduce evidence in support thereof or supplemental thereto, or in rebuttal of any evidence received on behalf of the organization.

(c) Hearings before a board or officer shall be informal and shall be conducted in an orderly and impartial manner.

(d) An organization shall be entitled to appear by counsel or other representative of its own choice.

(e) Testimony shall be given under oath or affirmation.

(f) The ordinary rules of evidence need not be adhered to at the hearings but reasonable bounds shall be maintained as to relevancy, competency and materiality. Both the Attorney General and the organization may introduce such evidence as the board or officer may deem proper in the particular case. In the discretion of the board or officer, the affidavit of any witness may be received in lieu of his oral testimony.

(g) Whenever, in the judgment of the board or officer, the proposed testimony of any witness appears to be irrelevant, immaterial, cumulative, or repetitious, the board or officer may refuse to receive such testimony.

(h) All objections to the admission or exclusion of evidence or other rulings of the board or officer shall be limited to a concise statement of the reasons therefor and shall be made part of the record. Argument upon such objections may be limited in the discretion of the board or officer.

(i) The board or officer shall be authorized to receive as evidence on behalf of the Attorney General information or

documentary material, in summary form or otherwise, without requiring disclosure of classified security information or the identity of confidential informants.

(j) Witnesses testifying before the officer or board shall be subject to cross-examination, provided that no witness on behalf of the Government shall be required to disclose classified security information or the identity of confidential informants.

(k) If in the course of a hearing any witness or other participant is guilty of misbehavior which obstructs the hearing, such person may be excluded from further participation in the hearing.

Section 41.9 *Recording of Testimony.* The testimony and proceedings at the hearing shall be recorded and transcribed by a person or persons designated by the Attorney General and made part of the record. The organization, by its counsel or authorized representative, shall be entitled to inspect the transcript, and, upon request and at its cost, shall be furnished a copy thereof.

Section 41.10 *Determination.* Within a reasonable time following completion of any proceeding hereunder, the Attorney General shall make a determination on the record which shall include the statement of the grounds, interrogatories, replies to the interrogatories, affidavits, and testimony elicited at the hearing and other documents and papers filed in the proceeding, and shall notify the organization of the determination by registered mail. In making his determination the Attorney General shall take into consideration any handicap imposed upon an organization by the non-disclosure to it of classified security information or the identity of confidential informants and by reason of the lack of opportunity to cross-examine confidential informants.

Section 41.11 *Previous Designations Not Affected.* The promulgation of the rules of procedure contained in this Part shall not be deemed a revocation of any designation made by the Attorney General pursuant to Paragraph 3, Part III of Executive Order No. 9835, but each such designation shall

continue in effect unless the administrative process herein provided is invoked by the organization affected and upon completion thereof a contrary determination is made by the Attorney General as to such organization.

SUPREME COURT, U. S.

No. 1074

FILED

MAR 5 1968

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

VETERANS OF THE ABRAHAM LINCOLN BRIGADE, ET AL., PETITIONERS

v.

ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1074

VETERANS OF THE ABRAHAM LINCOLN BRIGADE, ET AL., PETITIONERS

v.

ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM IN OPPOSITION

Petitioners ask this Court to exercise its extraordinary power under 28 U.S.C. 1254(1) to issue a writ of certiorari before judgment.

The Veterans of the Abraham Lincoln Brigade was originally designated by the Attorney General as a Communist organization pursuant to Executive Order 9835 and notice of this designation was given by publication in the Federal Register on October 21, 1948 (13 F.R. 6138). Subsequent to this Court's decision in *Joint Anti-Fascist Refugee Committee* v. *McGrath*,

341 U.S. 123, the Veterans of the Abraham Lincoln Brigade was redesignated under Executive Order 10450 (18 F.R. 2489) and regulations thereunder (18 F.R. 2619, 28 C.F.R. 41.1). Notice of this designation was given by publication in the Federal Register on May 12, 1953 (18 F.R. 2741).

From the date of its original designation under Executive Order 9835 until the present date the organization never filed a notice of contest of the original designation or of the continued designation under Executive Order 10450, as required by the regulations. On May 31, 1966, Veterans of the Abraham Lincoln Brigade requested the Attorney General to remove its name and the name of the Abraham Lincoln Brigade [1] from his list of subversive organizations; and on July 6, 1966, the request was denied.

On February 23, 1967, the Veterans of the Abraham Lincoln Brigade and three of its members instituted this action in the United States District Court for the District of Columbia seeking declaratory relief and to enjoin the Attorney General from continuing to list the Veterans as an organization seeking to alter the form of government of the United States by unconsitutional means pursuant to Executive Order 10450. On November 14, 1967, the district court entered its judgment granting the government's motion for summary judgment and dismissing petitioners' complaint. On November 24, 1967, petitioners filed a notice of appeal to the United States Court of

---

[1] The "Brigade" is no longer in existence, having expired in 1938 (Pet. p. 4).

Appeals for the District of Columbia Circuit and the case was docketed in that court on January 3, 1968. The petition for a writ of certiorari was filed in this Court on February 2, 1968.

Petitioners have failed to establish that this case "is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court." Rule 20 of this Court; see *Youngstown Co.* v. *Sawyer*, 343 U.S. 579; *United States* v. *United Mine Workers*, 330 U.S. 258. Indeed, the fact that petitioners allowed eighteen years to pass from the time of the original designation by the Attorney General to the time they instituted this action in the district court is clear evidence that there is no compelling reason why normal appellate procedure should not be followed. The fact that petitioners assert that the designation is unconstitutional is not alone sufficient to warrant the extraordinary exercise of this Court's jurisdiction. Cf. *W.E.B. DuBois Clubs* v. *Clark*, 389 U.S. 309.[2]

---

[2] Petitioners apparently sought this extraordinary action because a somewhat similar case was pending before this Court on a petition for a writ of certiorari, *Industrial Workers of the World* v. *Clark*, No. 953, this Term. Since certiorari was denied in the *I.W.W.* case on March 4, 1968, there is clearly no basis for the Court to grant certiorari before judgment in this case.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1968.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 292156 625